In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-62

RAMIRO RUBEN RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one conspiracy count and three substantive counts of an indictment charging him and others with selling heroin, in violation of 21 U.S.C. 174.[1] On

[1] Three others were charged in the indictment; the charges against one of the three, Jose Hinojosa, were dismissed prior to trial. The other two individuals, Rowland and Lopez-Hernandez, were tried with petitioner; each was found guilty on two counts. Lopez-Hernandez was sentenced to concurrent terms of five years on each count and appealed. Her conviction was reversed by the court below for insufficient evidence (Pet. App. 6). Rowland was sentenced to concurrent terms of ten years on each count. He did not appeal.

August 18, 1970, he was sentenced to imprisonment for fifteen years on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App.).

On June 20, 1969, one Bill Bessent, an undercover narcotics agent for the Texas Department of Public Safety, and co-defendant David Rowland, a heroin addict who had previously introduced Bessent to several heroin dealers, drove to the home of petitioner's sister, Evangelina Lopez-Hernandez, in El Paso, Texas (Tr. 68–71).[2] There, Rowland met petitioner; however, petitioner refused to meet with Bessent, fearing he was a policeman. On this occasion, petitioner sold five grams of heroin to Rowland, who, in turn, sold them to Bessent for $150 (Tr. 73–75).

Bessent next saw petitioner on August 20, 1969, again in the company of Rowland and at the home of petitioner's sister. Petitioner, who no longer seemed reluctant to deal with Bessent directly, agreed to sell the undercover agent two ounces of heroin (Tr. 82). The two men, accompanied by Rowland, walked into a bedroom where Bessent counted out $1,100 and placed it on a nightstand. Petitioner drew three jars of heroin from a drawer in the nightstand and began measuring out two ounces. As he was doing this, he called his sister, who immediately entered the room and removed the money (Tr. 83–87). Petitioner explained that he wanted the money hidden because he had once been robbed by a buyer as he was taking out the heroin (Tr. 125). He also stated that he had the

[2] "Tr." refers to the two-volume trial transcript, which we are lodging with the Clerk of this Court.

heroin brought across the river from Juarez, Mexico. After receiving the heroin, wrapped in plastic, Bessent informed petitioner that he would be returning to El Paso in about two weeks and wanted to buy 20 or 30 ounces of the narcotic at that time. Petitioner agreed to supply it (Tr. 89–90).

Bessent telephoned petitioner on September 11, 1969, and petitioner assured him that a good supply of heroin had arrived. The following day, Bessent drove to El Paso where, having arranged a surveillance by agents of the Bureau of Customs, he met petitioner in a bar. Bessent agreed to buy 15 ounces of heroin at $550 per ounce. Petitioner and the undercover agent then drove to an alley behind a shopping center (Tr. 94–97), and Bessent asked to see the heroin. Petitioner reached under the steering wheel of his car and pulled out a brown paper sack which he handed to Bessent. After inspecting it to assure himself that the bag contained heroin, Bessent signaled the surveillance team and placed petitioner under arrest (Tr. 98–99).

At trial, petitioner took the stand and admitted to making the narcotic sales charged in the indictment. He testified, however, that he had been coerced into dealing in narcotics by three men from Juarez, Mexico, who had threatened not only petitioner's life but the lives of his wife, mother and children if he did not cooperate (Tr. 309–315, 324–325, 335). He stated further that, in April, 1969, he had been shot two or three times in the back by these men, and that then, his assailants, holding a revolver to his head, had warned

him to remain silent (Tr. 317–320). Acknowledging that, since his arrest on September 12, 1969, he had neither seen nor heard from any of the three men, petitioner testified that he was nevertheless still frightened of them, especially because he was now in court (Tr. 347, 387–388).

On cross-examination, petitioner stated that, when he was arrested, there were at least seven law-enforcement officers around his car (Tr. 348–349). The prosecution then asked (Tr. 349):

> Q. All right, and you didn't tell a single one of those men this story that you have told from the witness stand this morning, did you?
>
> A. At that moment, I don't think so.
>
> Q. In fact, you never have told that story to any officer, that you told on the stand today?
>
> A. No.

Later, petitioner repeated that, prior to testifying in court, he had never told police of being pressured, despite ample opportunity to do so (Tr. 382–383). No objection to the interrogation was made at trial. In closing argument, the prosecutor referred to the fact that, at the time of his arrest, petitioner did not tell anyone that his family might be in danger (Tr. 441, 484).

Petitioner contends here, as he did below, that the prosecutor's cross-examination and comments on closing argument concerning petitioner's failure to notify authorities of the threats on his life and the alleged danger to his family violated his privilege against self-incrimination and his right to counsel, contrary to

Miranda v. *Arizona*, 384 U.S. 436. He argues that the court below erred in characterizing his silence in this regard as an act inconsistent with his asserted defense and therefore admissible under *Harris* v. *New York*, 401 U.S. 222.

It is clear that the government did not rely on petitioner's silence after arrest as carrying any implication of guilt; it was seeking to impeach petitioner's claimed justification for dealing in narcotics by showing an inconsistent act. His failure to seek police protection for his wife, mother and children at the time of his arrest, and thereafter, plainly casts doubt on the credibility of his testimony that he engaged in the sale of heroin to protect the lives of his family. This is especially true in light of petitioner's testimony that he had "never ceased to fear" the men who he claimed had threatened him (Tr. 387), and indeed indicated that he feared them even more "[n]ow that I am here in court" (Tr. 338). It was therefore not improper for the court below to rule that, once petitioner took the stand, not merely to deny his guilt, but to raise the affirmative defense of coercion, the prosecution could, under *Harris* v. *New York*, 401 U.S. 222, attempt to impeach his credibility by showing that petitioner had acted in a manner inconsistent with that defense.[3] Cf.

[3] Petitioner contends that the decision of the court below conflicts with decisions of other courts of appeals (Pet. 9–10). Most of the cases cited by petitioner, however, deal with evidence of silence at the time of arrest, often in the face of police interrogation, as an impermissible inference of guilt. They do not involve evidence of silence going to the question of a defendant's credibility on the witness stand, and introduced on

Brown v. *United States*, 356 U.S. 148, at 154–156; *Grunewald* v. *United States*, 353 U.S. 391; *Walder* v. *United States*, 347 U.S. 62. This is indeed an easier case than *Harris*, since the failure to seek protection for one's family would, in any ordinary sense, be considered collateral to the question of guilt for the offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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cross-examination solely for the purpose of showing an inconsistency with the defendant's asserted defense, as revealed by his own testimony. All of the cases on which petitioner relies were decided prior to this Court's decision in *Harris*.

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